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Office of the Compliance Advisor Ombudsman (CAO)

CAO ADVISORY: COMMENTS ON IFC DRAFT GOOD PRACTICE HANDBOOK ON LAND ACQUISITION AND INVOLUNTARY RESETTLEMENT

OVERVIEW

The Office of the Compliance Advisor Ombudsman (CAO) welcomes the opportunity to comment on the International Finance Corporation's (IFC) Draft Good Practice Handbook on Land Acquisition and Involuntary Resettlement ("Draft Handbook"). CAO's mandate is to address complaints from people affected by IFC and MIGA projects and to enhance the environmental and social (E&S) outcomes of projects through its dispute resolution, compliance, and advisory work. Over the past twenty years, 22 percent of CAO complaints have raised concerns related to land acquisition and involuntary resettlement. This memo gathers insights from CAO cases to inform the Draft Handbook.

Specifically, CAO examined dispute resolution and compliance cases that raised concerns related to land acquisition and involuntary resettlement with the aim of comparing the guidance in the Draft Handbook to the challenges in CAO's case experience. Box 1 (below) provides an overview of the scope, methodology, and analysis of CAO case work for this review. The accompanying reference table summarizes the applicable sections of IFC's Performance Standards and Guidance Notes, relevant CAO cases, and stakeholder views on the identified challenges.

CAO identified four challenge areas:

1. Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5): Scope of application

- Clarify whether impacts should be covered by Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5) or Performance Standard 1 on Assessment and Management of Environmental and Social Risks and Impacts (PS1).
- Provide additional guidance on legacy issues.

2. Compensation at Full Replacement Cost

- Provide further guidance on compensation for common pool resources, severance, and land areas without functioning real estate markets.
- Provide further guidance on provisions for delayed compensation.
- Clarify guidance on compensation for losses caused by land-use restrictions on land that is ultimately not used.

3. Disclosure, Consultation, and Informed Participation

- Provide further guidance on disclosure requirements.
- Provide additional guidance to assist clients with community engagement.
- Clarify rationale, and provide further guidance, related to grievance management.

4. Interplay with the Public Sector

- Provide guidance on supplementary activities following government-led land acquisition processes.

CAO commends IFC for the additional guidance the Draft Handbook provides on critical issues arising in CAO's casework, such as those related to legacy, calculating full replacement cost, delayed compensation, disclosure procedures, stakeholder engagement, and government-led processes. Areas where CAO's experience suggests further guidance will be beneficial are detailed in the following section.

Box 1. CAO Case Sample: Scope and Methodology

CAO examined 27 cases filed between 2008 and 2018 raising land acquisition and involuntary resettlement issues, covering multiple regions and industry sectors. CAO identified the sample by analyzing complaint and case documentation. CAO dispute resolution and compliance specialists helped catalogue the relevant issues, which were subsequently reviewed by a land acquisition and resettlement expert consultant in the context of the Draft Handbook.

CAO cases are handled by CAO's dispute resolution and/or compliance functions — the two services offered to address complaints. Compliance cases typically generate specific findings in relation to project due diligence and supervision in the context of IFC's Environmental and Social (E&S) policies and guidance materials. This provided the basis for the advisory insights drawn from compliance cases in the sample. In its dispute resolution work, CAO acts as a neutral third party and does not make judgments about the merits of E&S issues raised by complainants, nor the adequacy of institutional performance. Insights gathered from the sample of dispute resolution cases therefore focused on the perspectives of complainants and IFC and MIGA project sponsors with regard to land acquisition and resettlement issues, as disclosed in CAO case documentation.

CHALLENGE AREAS

1. Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5): Scope of Application

Clarify Whether Impacts Should Be Covered by PS5 or PS1

CAO's casework indicates that there are circumstances in which it is challenging to define the scope of application of PS5. More specifically, CAO cases demonstrate that the following affected groups and land uses are at risk of being overlooked in the processes set out by PS5:

- a) Transhumant and other mobile populations may be overlooked in the PS5 assessment process;
- b) Land and natural resource use may be overlooked or undervalued, for example:
 - i. Loss of access to common pool resources such as grazing ranges, fishing grounds, forests, and other areas used for gathering natural resources;
 - ii. Loss of customary rights of way etc., that pass through acquired land.

CAO's experience indicates that it can be unclear when an economic impact falls under PS5 (impact caused by project-related change in use of, or access to, land) versus PS1 (impacts otherwise caused or contributed to by the project). This is particularly important since both Performance Standards provide for compensation for adverse impacts, however the framework for compensation under PS5 appears to be more established and well-articulated, for example in Guidance Note 5, than under PS1.

CAO Suggestions:

Provide clearer guidance as to which losses or situations are governed by PS5. Examples that demonstrate the extent of its application would also be useful. Illustrative CAO cases include:

- India: [Tata Ultra Mega-01](#) (CGPL) in relation to the need to assess the land use of mobile communities.
- CGPL in relation to the ways that a project may impact land use and access beyond land formally acquired for the project.
- CGPL and India: [Vizhinjam-01](#) in relation to the need to assess impacts of loss of customary access rights.¹

Additional relevant case examples are listed in the reference table.

¹ For more information, see CAO Tata Ultra Mega-01 (http://www.cao-ombudsman.org/cases/case_detail.aspx?id=171) and CAO Vizhinjam-01 (http://www.cao-ombudsman.org/cases/case_detail.aspx?id=189) case pages.

Provide Additional Guidance on Legacy Issues

Several cases highlighted the challenges of assessing and remedying the impacts of land acquisition and resettlement processes that pre-exist IFC's involvement in a project (and, in some cases, pre-exist the involvement of the client). Unresolved legacy issues may be experienced as issues of current concern long after the original land acquisition has taken place. In these situations, cut-off dates or other similar legacy scoping strategies may not sufficiently address the concerns of affected communities and may lead to project-level disputes.

CAO commends the Draft Handbook for discussing legacy issues in detail and provides useful methods for identifying them (pp. 247-252). CAO also welcomes the inclusion of guidance indicating that where "past land-acquisition and resettlement activities have been significant, IFC (...) will typically require an independent audit of past land-acquisition and resettlement activities against IFC PS5 requirements" (p. 247), and that guidance on the scope of such an audit is also provided. However, the Draft Handbook would benefit from discussing how legacy issues beyond this scope can also affect projects, and from providing strategies to anticipate and mitigate against potential areas of dispute.

CAO Suggestions:

- Provide guidance on determining whether or not past land transactions may be perceived as an ongoing injustice by affected communities and may pose challenges today.
- Provide guidance on employing participatory approaches to address legacy issues, such as mediation. An illustrative CAO case, Philippines: [Ambuklao-Bingra Hydroelectric Power-01](#), led to resolution of a 60-year-old land dispute between an IFC client and local community.²

Additional relevant case examples are listed in the reference table.

2. Compensation at Full Replacement Cost

Provide Further Guidance on Compensation for Common Pool Resources, Severance, and Land Areas without Functioning Real Estate Markets

CAO's casework identifies challenges for IFC and its clients in calculating the full replacement costs of the following assets:

1. Land in areas without a functioning real estate market
2. Perennials
3. Businesses
4. Economically valuable common pool resources such as grazing ranges, pasture, fishing grounds, and rights of way
5. Losses experienced by assets not, or not fully, acquired (severance)

² For more information, see CAO Ambuklao-Bingra Hydroelectric Power-01 (http://www.cao-ombudsman.org/cases/case_detail.aspx?id=85) case page.

In this context, CAO commends the Draft Handbook for providing significant guidance on how clients should compute full replacement costs for perennials and businesses (pp. 48-54). However, the Draft Handbook would also benefit from more discussion on compensation for land areas without functioning real estate markets, common pool resources, and severance. In relation to compensation, CAO casework shows that land may be undercapitalized, but held as safety nets or heritable resources, among other purposes. The application of the income method as a basis for compensation and livelihood restoration in these contexts is especially difficult.

CAO Suggestion:

Provide additional guidance on the provision of compensation at full replacement costs for common pool resources, severance and areas without functioning real estate markets.

Relevant case examples are listed in the reference table.

Provide Further Guidance on Provisions for Delayed Compensation

Despite clarifications provided in Guidance Note 5 (para. 23, 33, and 58), CAO cases show that there is a risk of under compensation when assets are valued at one point in time, but compensation is paid later. These situations may arise when payment of compensation or land acquisition processes are delayed.

CAO welcomes the additional clarity the Draft Handbook provides on how clients should address delays between asset-inventories and finalization of individual entitlements by suggesting that “where land-acquisition is delayed, compensation rates should be updated every year” (p. 55). However, additional guidance would be beneficial to assist clients in navigating this challenge, including where it is a government-led land acquisition process.

CAO Suggestion:

Provide additional guidance on how delays at each step of Resettlement Action Plan (RAP) preparation and implementation should be addressed to ensure that when delays occur, compensation is nevertheless provided at full replacement cost, including in situations where it is a government-led land acquisition process.

Relevant case examples are listed in the reference table.

Clarify Guidance on Compensation for Losses Caused by Land-Use Restrictions on Land that is Ultimately Not Used

While Performance Standard 5 allows clients to utilize a well-documented and disseminated cut-off date to determine eligibility for resettlement and livelihood restoration benefits, changes to a project’s footprint, among other reasons, can result in the inclusion of land and assets that are not ultimately acquired.

In CAO's casework, there are instances where IFC's clients did not provide compensation under these circumstances. According to some clients, compensating land and assets was unnecessary because cut-off dates were largely ignored by affected communities. While this may be true in certain instances, CAO cases suggest that there are also project-affected people that respect cut-off date restrictions and consequently experience losses between the announcement and recall.

The Draft Handbook addresses this issue by noting that "in cases where a cut-off has been declared and land acquisition is cancelled due to a change in footprint, project sponsors should consider compensation for the disturbance to previously affected residents, landowners, and land users" (p. 40). It also recognizes that cut-off dates tend to result in affected people suspending normal activities, and subsequently recommends that "they be encouraged to continue these activities until compensation measures have been agreed and they have been given notice to stop project-affected livelihood activities" (p. 122). These two pieces of guidance may be confusing to clients. The first understands that cut-off dates tend to result in disturbances to project-affected communities, but the latter encourages the continuation of activities, which contradicts the purpose of a cut-off date.

CAO Suggestions:

- Ensure guidance around cut-off dates is consistent;
- Clarify how clients should compensate losses triggered by the cut-off date on non-acquired land; and
- Provide methodologies for calculating compensation on temporary restrictions that may result in the freezing and unfreezing of land and assets.

Relevant case examples are listed in the reference table.

3. Disclosure, Consultation, and Informed Participation

Provide Further Guidance on Disclosure Requirements

IFC's Performance Standards harmonize disclosure requirements under PS1, and therefore the level of detail provided in relation to disclosure under PS5 is limited. CAO's casework points to challenges clients have in interpreting these harmonized disclosure requirements, which can result in limited meaningful disclosure of information to people affected by land acquisition and involuntary resettlement.

The Draft Handbook includes thorough guidelines on how disclosure should be conducted (pp. 106-108). The details on what should be disclosed, however, are too general.

CAO Suggestion:

Provide additional guidance on what the Guide to Land Acquisition and Compensation (GLAC) should disclose, as well as how disclosure arrangements operate at the household level.

Relevant case examples are listed in the reference table.

Provide Additional Guidance to Assist Clients with Community Engagement

Many CAO cases involving land acquisition and involuntary resettlement raise concerns about how affected households and people are represented in consultation processes, particularly in large footprint projects that rely on forms of consultative committees. Representation issues can be exacerbated in situations where community members have differing views about land acquisition and resettlement activities, which can create additional challenges for clients trying to accommodate competing interests while intending to do no harm. Creating consultative structures, such as committees and sub-committees, within project-affected communities can be highly sensitive. Requirements in PS5 (para. 10) for clients to conduct appropriate and informed consultations in these situations can be challenging to implement.

CAO welcomes the Draft Handbook's enhanced guidance for practitioners on these issues (pp. 73-78, 98, 184). At the same time, there is limited guidance on how other stakeholders, such as project-affected community members or government partners, can meaningfully engage in those processes. In CAO's experience, developing the capacity of stakeholders to participate in engagement processes is a key element for successfully facilitating mutually acceptable agreements.

CAO Suggestions:

- Discuss potential capacity building activities to help community representatives carry out their responsibilities during a consultative process;
- Provide guidance for clients on how to navigate community representation, for example through pre-existing community meeting structures;
- Provide additional guidance on accessibility, including approaches for ensuring documentation such as the GLAC and RAP are understandable, as well as reducing gaps in communication in what are often long and changing processes; and
- Include specific resources for project-affected communities and other stakeholders on how to engage in a PS5-governed resettlement process. Clients could be advised to provide this type of guidance to affected populations.

Relevant case examples are listed in the reference table.

Clarify Rationale and Provide Further Guidance Related to Grievance Management

CAO cases show that grievance handling around a resettlement process is a key challenge. Common issues include the role of government versus that of the IFC client, and the requirement to have in place a second-tier grievance management system (the “RAP Grievance Mechanism” as specified by PS5) in addition to the client’s own grievance redress mechanism.

The Draft Handbook usefully highlights the differences in scope and approach between the client’s grievance redress mechanism and the RAP Grievance Mechanism (pp. 109-112). Further, it adds relevant guidance for clients on the tasks of the grievance redress mechanism, as well as for different arrangements to provide for an independent RAP Grievance Mechanism.

CAO experience shows the need for additional clarity in the Draft Handbook on the rationale for a second-tier grievance management system, as well as further guidance and good practice examples that demonstrate why such a system is necessary. CAO cases also illustrate the importance of ensuring that these RAP Grievance Mechanisms enjoy the trust of the project-affected people and have the mandate to deal with the range of likely disputes emerging from the resettlement process.

CAO Suggestions:

- Provide a clearer statement about the need for the second-tier grievance management system and good practice examples of such systems that demonstrate its necessary independence from the project operator.
- Align the Draft Handbook with Section III of [IFC’s Good Practice Note on Addressing Grievances from Project-Affected Communities](#) (2009, p. 14), particularly on how to “engage third parties to help raise confidence in the impartiality of the process and create a level playing field in cases where significant imbalances in knowledge, power, and influence exist”³, as well as the “Building trust in a grievance mechanism” section of [CAO’s Grievance Mechanism Toolkit](#)⁴; and
- Provide guidance on the mandate of the RAP Grievance Mechanism, clarifying that it includes disputes over: (a) the extent of the land acquisition; (b) the accuracy of baseline assessments; (c) assessments of vulnerability; (d) implementation of livelihood restoration programs; and (d) valuation of assets.

Relevant case examples are listed in the reference table.

³ “Addressing Grievances from Project-Affected Communities.” 2009. Good Practice Note. IFC. https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Publications/Publications_GPN_Grievances.

⁴ “Grievance Mechanism Toolkit.” 2017. Compliance Advisor Ombudsman. www.cao-grm.org.

4. Interplay with the Public Sector

Provide Guidance on Supplementary Activities Following Government-Led Land Acquisition Processes

CAO's casework suggests that some IFC clients interpret PS5 in a way that limits their involvement in government-led land acquisition processes to collaboration "with the responsible government agency, to the extent permitted by the agency" as described in PS5 (para. 30). In turn, they may pay less attention to PS5 provisions (paras. 31 and 32) that establish certain requirements for clients if the responsible government agencies are not permitting an alignment of their process with PS5.

In CAO's cases, this seems to affect the valuation process and coverage of tenants and workers of displaced enterprises, as well as informal settlers. Further, these issues may be triggered by the limited guidance on the scope of PS5, and how to compute full replacement costs (see pp. 4-5 above). CAO's casework also suggests that Supplemental Resettlement Plans (SRPs) may not be consistently used to ensure that government-led land acquisition processes are aligned with PS5 process and outcome requirements.

The Draft Handbook provides good additional guidance for clients on situations where national and IFC provisions may differ and how to address gaps through agreements with the government (pp. 244-245). However, CAO notes that there is limited guidance provided on what to do if the responsible government agency does not want to engage on such a course of action. When an IFC client works with government-led land acquisition, a concerted effort is required to ensure that process and outcomes are consistent with PS5. This can be achieved by working together with the government on the process and/or through the implementation of supplementary (gap filling) activities by the client.

CAO Suggestions:

- Provide detailed guidance on how clients should assess, plan for, and monitor government-led resettlement processes;
- Provide detailed guidance that supports clients in organizing impartial monitoring of government-driven activities from planning through to project completion;
- Provide approaches for engaging with less cooperative government agencies, as well as guidance on using SRPs for gap filling;
- Provide guidance on assessing compensation awards for gaps against PS5 standards, including when national administrative agencies and/or courts are involved;
- Adopt similar language as for the requirement to conduct RAP completion audits.

Relevant case examples are listed in the reference table.

CONCLUSION

CAO appreciates the opportunity to comment on IFC's Draft Good Practice Handbook on Land Acquisition and Involuntary Resettlement. Drawn from our case experience, CAO's inputs are focused on situations where achieving PS5 process and outcome requirements has proven challenging in practice. The Draft Handbook already provides additional guidance for some of these challenge areas. CAO identified other issues that will benefit from further clarity and where providing guidance for clients, as well as other stakeholders, will be useful. CAO welcomes any questions about these comments.